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In The
Supreme Court of the United States

OCTOBER TERM, 1952

No. 491

HOXSEY CANCER CLINIC, a partnership, and
HARRY M. HOXSEY, an individual,
Petitioners,
VERSUS
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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DECEMBER, 1952.

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PETITION FOR A WRIT OF CERTIORARI

May It Please the Court:

The Petition of Hoxsey Cancer Clinic, a partnership, and Harry M. Hoxsey, an individual, respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved

The United States of America filed this action in the United States District Court for the Northern District of Texas under the provisions of the Federal Food. Drug and Cosmetic Act (21 U.S.C. 301, *et seq.)*, seeking injunctive relief to prevent petitioners from introducing into interstate commerce certain medicines intended for use in the treatment and cure of cancer. The Complaint (R. 3) alleges specifically that the drugs, which are distributed and dispatched to physicians, practitioners, and other persons, by petitioners, are misbranded, because their labeling, specifically a booklet accompanying them, contains "general and specific statements which represent and suggest that said drugs are efficacious in the treatment, mitigation and cure of cancer in man, which statements are false and misleading since said drugs are not efficacious in the treatment, mitigation and cure of cancer in man."

After an extended trial before the Honorable William H. Atwell, United States District Judge, the trial court made Findings of Fact and Conclusions of Law (R. 1140, *et seq.)* and based thereon entered judgment (R. 1149) on December 14, 1950, denying the injunction prayed for. Judge Atwell's opinion is reported in 94 F. Supp. 464.

The Government appealed from said decision to the United States Court of Appeals for the Fifth Circuit, and

that court on July 31, 1952, entered judgment (R. 1173), reversing the judgment of the District Court and ordered said cause remanded with direction that the trial court order an injunction to issue as prayed. The opinion of the Court of Appeals written by Russell, C. J., appears in the record (R. 1157) and is reported in 198 F. 2d 273.

Petition for Rehearing (R. 1174) was duly filed, and the same was overruled on September 10, 1952 (R. 1194).

B.

Basis of Jurisdiction of This Court

Jurisdiction of this Court to review said decision by writ of certiorari is given by U.S.C., Title 28, Section 1254(1), 62 Stat. 928, and this Petition is filed within the period of ninety days provided by U.S.C., Title 28, Section 2101(c).

C.

Questions Presented

Whether the Court of Appeals, under Rule 52(a) of the Federal Rules of Civil Procedure, may entirely disregard Findings of Fact of the trial court in an action tried upon the facts without a jury, and proceed to weigh the evidence and pass upon the credibility of the witnesses and set aside the trial court's judgment solely by

resolving a conflict of medical opinion between two separate schools of thought as to the proper and best methods of treatment of patients for disease?

D.

Reasons Relied on for the Allowance of the Writ

1. The decision of the Court of Appeals is probably in conflict with applicable decisions of this Court, particularly *United States* v. *U. S. Gypsum Co.*, 333 U.S. 364, 68 S. Ct. 525, 92 L. ed. 746, holding that oral testimony elicited by leading questions would be given little weight on appeal where such testimony *directly conflicted with documentary evidence;* and with *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 70 S. Ct. 177, 94 L. ed. 105, holding that a choice by the trier of facts between two permissible views of the *weight* of evidence is not *"clearly erroneous"*; and with *National Labor Relations Board* v. *Pittsburg S. S. Co.*, 337 U.S. 656, 69 S. Ct. 1283, 93 L. ed. 1602, holding that Rule 52 applies to appeals by the Government as well as to those by other litigants, and that a choice by the finder of fact between two permissive views resolving all factual conflicts in favor of one litigant, is not "clearly erroneous."

2. The decision of the Court of Appeals is probably in conflict with applicable decisions of other Courts of Appeals, particularly *Orvis* v. *Higgins* (C.A. 2), 180 F. 2d 537, holding that the proper interpretation of

Rule 52(a) is that Findings of Fact by a trial judge sitting without a jury may be disregarded on appeal and findings by the Court of Appeals substituted therefor *only* where the findings of the trial court are based on *written* evidence *alone*, where such evidence is partly oral and partly written and the written evidence is decisive of the facts, and that findings based entirely on oral testimony may be disturbed "only *in the most unusual circumstances*"; and *Colusa Remedy Co.* v. *U. S.* (C.A. 8), 176 F. 2d 554, holding that an Appeals Court will not overrule the findings of the trial court where it appeared that the question of effectiveness had not transcended the realm of opinion into the realm of demonstrable fact; and *United States* v. *Dr. David Roberts Vet. Co.* (C.A. 7), 104 F. 2d 785, holding that a man should not be convicted because he has not received the endorsement of the medical profession and that the Court of Appeals had no *power* to *weigh conflicting evidence* concerning effectiveness of drugs; and *United States* v. *Kaadt* (C.A. 7), 171 F. 2d 600, and *United States* v. *Six Dozen-Dr. Peter's Juriko* (C.A. 7), 158 F. 2d 667, to the same effect.

3. The decision of the Court of Appeals decides an important question of Federal law which has not been fully, but should be, settled by this Court, in that there is confusion among the decisions from the various Courts of Appeals as to the true meaning of Rule 52(a) of the Federal Rules of Civil Procedure, particularly as to the

precise limitations of the term "clearly erroneous" as applied to Findings of Fact, and as to the extent of the "due regard" which shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

4. The decision of the Court of Appeals decides a question of substance relating to the application of the Constitution of the United States by depriving many persons of their right to life and liberty and general welfare concerning a matter the powers to regulate which were not delegated to the United States but were reserved to the people themselves.

Prayer for Writ

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the Fifth Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, "No. 13645, United States of America, Appellant, versus Hoxsey Cancer Clinic, a partnership, and Harry M. Hoxsey, an individual, appellees"; and that said judgment of the said Court of Appeals for the Fifth Circuit may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the

premises as to this Honorable Court may seem meet and just.

HOXSEY CANCER CLINIC, and
HARRY M. HOXSEY,
Petitioners,
By HERBERT K. HYDE and
ROY ST. LEWIS,
Attorneys for Petitioners.

The undersigned attorneys for petitioners hereby certify that we believe there is merit in the foregoing Petition and that the same is filed in good faith and not for delay.

HERBERT K. HYDE
ROY ST. LEWIS
Attorneys for Petitioners.

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No.

HOXSEY CANCER CLINIC, a partnership, and
HARRY M. HOXSEY, an individual,
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VERSUS

UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

Opinions

The opinion of the United States District Court for the Northern District of Texas (R. 1140) was rendered by William H. Atwell, United States District Judge, and is reported in 94 F. Supp. 464.

The opinion of the Court of Appeals for the Fifth Circuit (R. 1157) (Hutcheson, Chief Judge, and Rus-

sell, and Rives, Circuit Judges; written by Circuit Judge Russell) is reported in 198 F. 2d 273.

II.

Jurisdiction

Jurisdiction of this Court to grant certiorari is invoked under Title 28, Section 1254(1), U.S.C.A., 62 Stat. 928, and is shown in the Petition at Page 3.

III.

Statement of the Case

As shown in the Petition at Page 2, the United States of America seeks to enjoin shipment in interstate commerce by petitioners of certain medicines intended for use in the treatment and cure of cancer, alleging misbranding thereof under the Federal Food, Drug and Cosmetic Act (21 U.S.C. 301, *et seq.)*. The misbranding is alleged to be because of certain statements contained in a booklet describing petitioners' clinic at Dallas, Texas, and its work in the treatment and cure of cancer.

At the time of trial Dr. J. B. Durkee, D.O., was, and had been for the preceding five years (R. 802) the Medical Director in charge of the Hoxsey Cancer Clinic, and testified that he had diagnosed and treated between 5,000 and 6,000 cases of cancer (R. 906). The record shows that he personally examined every patient (R. 910) to whom the medicine was sent, except in instances where it had previously been sent to other physicians

in other States, *i.e.*, Dr. E. S. McCauley (R. 545) and Dr. L. E. Downs (R. 35, 45), both of whom had made special studies in residence at the Hoxsey clinic and who used the medicines in treating their own patients. This practice of sending medicines to other doctors had been discontinued prior to the trial, and since every patient is personally examined at the clinic in Dallas by physicians qualified under the laws of Texas by taking the same examinations as doctors of medicine, before any medicine is given or sent to them.

As stated by the trial court in its opinion (R. 1144) "after six days of the introduction of voluminous verbal testimony from both physician and patient, for both sides, and voluminous exhibits from both sides," the trial court made Findings of Fact as follows:

"FINDINGS OF FACT

1.

"The respondent did forward in interstate commerce to physicians in other States who had been present at the Hoxsey Clinic and studied its methods and efficacy for a considerable time, and were using such medicines and prescriptions, in their similar treatment.

2.

"That accompanying such shipments were booklets containing the statements and illustrations quoted in the pleadings of both complainant and respondents.

3.

"That the respondents' treatment *is not injurious. Some it cures, and some it does not cure, and some it*

relieves somewhat. That respondents do not guarantee to cure.

4.

"That the statements contained in said labels so pleaded, are neither false nor misleading. That if in doubt as to the effectuality of the treatment, they take the patient on trial, and frequently, without charge to the patient.

5.

"That the percentage of efficient and beneficial treatment by respondents is reasonably comparable to the efficiency and success of surgery and radium, and without the physical suffering and dire consequences of radium, if improperly administered, and surgery, if not successful in completely removing the entire malignant portion.

6.

"That cancer is an aggregation of outlaw cells with the propensity to migrate and grow in size and in the territory covered and the definite destruction of the body, or, a serious portion thereof.

7.

"That the respondents do have two basic medicines to which are added, if and when the examination of the patient calls for such additions, a large number of drugs and mitigations in a separate room at the clinic. That it also subtracts and changes the basic elements of the two medicines as indicated, in the judgment of the Medical Director of the clinic when indicated by the examination of the patient, but that no such prescription accompanies shipments made in interstate commerce to the doctors in other States who are using the Hoxsey method, nor does the same appear upon the bottles or receptacles of the medicine.

8.

"That the Food and Drug inspectors seized medicines and pamphlets and booklets such as are pleaded, from the doctors in other States who have been using the Hoxsey method, and which came interstate commerce. That such seizures were prior to the institution of this suit, since which time the respondents have made no interstate shipments of either pamphlets, or, medicines.

"CONCLUSIONS OF LAW

"It is not necessary that mislabeling, or misbrandings within the meaning of the Act shall actually be on the container, but they may accompany it, or, reach the user in some other manner. There is some authority to the contrary, but I think the case of *Kordel* v. *United States*, 335 U.S. 345, and the case of *United States* v. *Urbuitit*, 335 U.S. 355, are controlling.

"The exemptions provided for in the Act with reference to physicians' prescriptions, and the placing of the contents on the bottle, or, container, are not applicable, nor can they be of any use to the respondents here, because the respondents' method in forwarding articles and pamphlets to the physicians in other States who were using the method and treatments were not so displayed. Nor can the plea of good faith or, the charitable inclinations of the respondents save them from the rigors of the Act. Nor can the discontinuance of the practice of shipments to physicians in other States, save the respondents from the injunctive features of the Act, even though the Chancellor, speaking in equity, will not require that which is useless.

"*Nevertheless, the facts disclosed by the testimony and found as above, as well as the failure of the Government to successfully carry the burden and show by a preponderance of the testimony, the correctness of its charges,* merits, and must have, a refusal of the injunctive relief sought, and a dismissal

of the bill, and such order and decree is, accordingly, announced."

From the foregoing the Government appealed to the Court of Appeals for the Fifth Circuit, and in its Brief filed in that court urged, (I) That there was undisputed proof of specific charges of misbranding, (II) That it was prejudicial error for the trial court to permit laymen to testify that they had cancer, and (III) That the trial court's finding that the Hoxsey drugs are not falsely represented as cancer cures and that they do cure cancer are *clearly erroneous* and should be set aside.

The Court of Appeals reversed the trial court by reaching the conclusion (R. 1172) that the finding of the trial court that the representations were neither false nor misleading is "against the *great preponderance* of the *credible* testimony; that it does not reflect or represent the truth and right of the case" [citing *Sanders* v. *Leech* (C.A. 5), 158 F. 2d 486], and that on the entire evidence the Court of Appeals was "left with the definite and firm conviction that a mistake has been committed" [citing *United States* v. *Gypsum Co.*, 333 U.S. 364, 395].

In so doing, as will be demonstrated in the argument, the Court of Appeals did nothing except to *weigh* the evidence, pass upon the *credibility* of the witnesses, and assume the position of a trier of the facts.

IV.

Specifications of Error, and Summary of Argument

A. A correct interpretation of Rule 52(a) of the Federal Rules of Civil Procedure does not give to the Court of Appeals power to entirely disregard Findings of Fact of the trial court in an action tried upon the facts without a jury, and proceed to *weigh* the evidence and pass upon the *credibility* of the witnesses and set aside the trial court's judgment solely by resolving a conflict of medical opinion between two separate schools of thought as to the proper and best methods of treatment of patients for disease. Where it is necessary to *weigh* evidence (particularly oral evidence) and pass upon the *credibility* of witnesses, a Court of Appeals cannot say that the findings of the trial court are "clearly erroneous."

B. The granting of an injunction against petitioners would take away from him and from patients desiring to come to his clinic for treatment and medicine, their constitutional right to have a qualified doctor of their own choosing and to receive and take the medicines prescribed by such doctor.

V.

Argument

A.

The pertinent part of Rule 52(a) of the Federal Rules of Civil Procedure provides:

> "In all actions tried upon the facts without a jury * * *, the court shall find the facts specially

and state separately its conclusions of law thereon * * *. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. * * *"

The Findings of Fact and Conclusions of Law by the trial court in this case have been set forth in detail in Paragraph III of this Brief.

On appeal the Government advanced the contention that the Findings of Fact of the trial court were *clearly erroneous,* and the Court of Appeals approached the case on that question, and said (R. 1164):

"In approaching this question we are guided by some well recognized beliefs and experience so universally entertained and accepted by the practically unanimous *aggregation of medical science* as that contradiction thereof does not raise a substantial issue of fact. Thus, with practical unanimity, *those informed and in position to know* are of the firm belief that there is only one reliable and accurate means of determining whether what is thought to be cancer is, in truth and fact, actually cancer. * * * It is further true that despite the vast and continuous research which has been conducted into the cause of, and possible cure for, cancer the aggregate of medical experience and *qualified experts* recognize in the treatment of internal cancer *only* the methods of surgery, X-ray, radium and some of the radioactive by-products of atomic bomb production. This is so even though the ghastly truth is that these methods frequently fail and are, in many cases, themselves unsatisfactory. But it is true, nevertheless, that with present enlightenment they are our sole defenses against the scourge of cancer."

The "qualified experts" who testified and upon whose opinion the Court of Appeals bases its conclusion

as to the beliefs and experience of the "aggregation of medical science" by "those informed and in position to know," consisted of Dr. David I. Macht, a specialist in pharmacological and experimental therapeutics (R. 85), who himself stated that he *did not treat cancer* patients because "I know my limitations" (R. 97), and had never seen a single patient that was taking the Hoxsey drugs (R. 98); Dr. Max Goldzieher, a pathologist, who stated he had *never cured a cancer* (R. 115), and was not a cancer man (R. 117); Dr. George Burroughs Mider, a pathologist who testified concerning an experiment with *mice* using petitioners' medicines, but who had himself *treated* only a relatively few cases of cancer (R. 148), and Dr. William S. Murray, who conducted the experiment and whose entire career had been in "experimental cancer" (R. 123) and who stated that he was *not an expert* in the *treatment* of cancer, but only in its behavior (R. 134). (In our Brief and Petition for Rehearing we pointed out some serious errors in the calculations in this experiment, but that is of no consequence here). Also, Dr. R. L. Clark, a professor in the University of Texas and director of a hospital in Houston for cancer *research*, whose opinion was that the only certain way to definitely diagnose a cancer was by biopsy, that the appropriate methods for treating internal cancer are surgery, or radiation therapy, and who knew of no medicine taken orally that would cure cancer. Opposed to this *expert* testimony by "those informed and in posi-

tion to know," Dr. J. B. Durkee, Medical Director of the Hoxsey Cancer Clinic for the past five years (R. 902), testified that he had diagnosed and treated between 5,000 and 6,000 cases of cancer (R. 906), that he *can* determine cancer, and considers himself a specialist, and that he personally examines every patient (R. 910); described fully the method of examination, diagnosis and treatment (R. 918, *et seq.)*, the laboratory facilities and technicians (R. 926). Dr. Durkee was supported by the testimony of Dr. E. S. Macauley (R. 545, 549) and the Government witness Dr. E. L. Downs (R. 45, 47, 50), both of whom testified they had successfully treated persons afflicted with cancer by use of the Hoxsey medicines.

With this conflict of medical opinion the Court of Appeals, after making the above quoted statement, states (R. 1165):

> "We think this statement evidences no *acceptation of any particular school or segment* of *qualified* expert medical opinion and belief * * *. A court should not be so blind and deaf as to fail to see, hear and understand the import and effect of such matters of general public knowledge and acceptance, especially where they are established by the *overwhelming weight* of disinterested testimony as appears in the record now before us."

In *weighing* this evidence the Court of Appeals comments in its opinion that Dr. Macht had "impressive qualifications" (R. 1166), that Dr. Goldzieher was likewise "qualified and experienced in his specialty," that "the physicians and scientists participating in the *test*

possessed *superior* qualifications, and that Dr. Clark also was "an expert of *superior* qualification and experience" (R. 1167). The Court of Appeals then outlines the general pattern of the Government testimony concerning patients who had been treated by the Hoxsey method, and concludes that "If such testimony be accepted as *credible*, it clearly establishes the Government's contention" (R. 1168). The Court of Appeals then outlines briefly the evidence of the petitioners, stating (R. 1170) that such summaries are made,

> "* * * to show the general nature of the case put forward by the plaintiff and the defendant and to point up the *difference in the type of proof*,"

from which it concludes (R. 1171) that,

> "* * * the overwhelming *preponderance* of *qualified* opinion recognizes,"

that,

> "* * * the testimony of the three *osteopaths*—(one) of whom is a definitely *interested* witness who testified as to ability to diagnose contrary to *all accepted scientific* knowledge."

is not sufficient to "substantially dispute" the Government's case and was,

> "* * * wholly insufficient to cast such doubt as to authorize the trial court to find that the Government had failed to carry the burden of establishing the truth of the allegations of its complaint."

The Court of Appeals therefore concluded that the *evidence* (R. 1172),

> "* * * *considered* as a whole, should, and must, induce a conviction that the *finding* of the trial court

> that the representations were neither false nor misleading is so 'against the *great preponderance* of the credible testimony that it does not reflect or represent the truth and right of the case,' "

citing *Sanders* v. *Leech* (C.A. 5), 158 F. 2d 486; and that,

> "*On the entire evidence* we are 'left with the definite and firm conviction that a mistake has been committed,' "

citing *United States* v. *Gypsum Co.*, 333 U.S. 364, 395.

It is submitted that these two cases do not uphold the Court of Appeals in thus disregarding the findings of the trial court, and, without giving "due regard to the opportunity of the trial court to judge of the *credibility of* the witnesses," *weighing* the evidence, *resolving a conflict* of medical opinion between two schools of thought—osteopaths versus medical doctors (both of whom take the same examinations in Texas)—passing upon the *credibility* of the witnesses, and thus concluding that the findings of the trial court are "clearly erroneous" within the meaning of Rule 52(a) above quoted.

The statement by this Court in *United States* v. *U. S. Gypsum Co.*, 333 U.S. 364, 92 L. ed. 746, 68 S. Ct. 525, above quoted in the opinion of the Court of Appeals herein, was based peculiarly upon the factual situation existing in that case, where there was oral testimony as to the purpose of doing certain things, elicited by leading questions, and such testimony *directly conflicted with documentary evidence*, for which reason this

Court held that it could give the conflicting oral evidence "very little weight," "despite the opportunity of the trial court to appraise the credibility of the witnesses." Such is not the case here. The conflict here is not between documentary evidence and oral testimony, but between witnesses holding to two separate schools of thought and belief as to the proper and best methods of treatment of patients for disease.

A much more instructive announcement of the application of Rule 52(a) adaptable to this case is made in *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 70 S. Ct. 177, 94 L. ed. 105:

> "The objectivity of the trier of fact cannot be questioned merely because he resolves all factual conflicts arising in a legal proceeding in favor of one litigant."

and,

> "* * * a choice by the trier of facts between two *permissible views of the weight of evidence* is not 'clearly erroneous.' "

and in that case this Court quoted from *National Labor Relations Board* v. *Pittsburg S. S. Co.*, 337 U.S. 656, 69 S. Ct. 1283, 93 L. ed. 1602, as follows:

> "If defendants' witnesses spoke the truth, the findings are admittedly justified. * * * It ought to be unnecessary to say that Rule 52 applies to *appeals by the Government* as well as to those by other litigants. There is no exception * * *. Such a choice between two permissible views of the weight of evidence is not 'clearly erroneous.' "

The statement quoted by the Court of Appeals in its opinion in this case from an opinion by the same court in *Sanders* v. *Leech, supra,* is but a quotation of a *generalization.* Of course no court should reverse any case unless it is "left with a definite and firm conviction that a mistake has been committed." The fallacy of making that quotation as authority for what the Court of Appeals has done in this case is shown by looking at the facts in that case. The same court there refused to do just what it did do here, reverse the findings of the trial court, saying:

> "It is not for the appellate court to substitute its judgment on disputed issues of fact for that of the trial court where there is substantial credible evidence to support the findings.
>
> "He is asking us * * * to assume the role of the trial judge, a role we may not play."

A very great number of reported cases have established the rule that a "Trial court's findings of fact supported by substantial evidence are conclusive on appeal," and that "that view of the evidence must be taken which is most favorable to the prevailing party," and that it is the province of the Court of Appeals "to determine *not* whether *it* would itself have made the same findings, but merely whether they rest on any rational basis of evidence," and that such findings are not to be "lightly set aside," etc. A few such cases are:

Soy Food Mills v. *Pillsbury Mills* (C.A. 7), 161 F. 2d 22, stating:

"Trial court's findings in respect of *merits of a formula* is conclusive on appeal where there is evidence to support it."

Federal Savings & Loan Ins. Corp. v. *First Natl. Bank* (C.A. 8), 164 F. 2d 929:

"On appeal that view of the evidence must be taken which is most favorable to the prevailing party, and if, when so viewed, the findings are supported by substantial competent evidence, they should be sustained."

Arnstein v. *Porter* (C.A. 2), 154 F. 2d 464:

"Where the facts are in real dispute, it is the function of the Circuit Court of Appeals * * * to determine *not* whether (it) would itself have made them, but merely whether they rest on sufficient evidence in the record."

Gipps Brewing Corp. v. *Central Mfgrs. Mut. Ins. Co.* (C.A. 7), 147 F. 2d 6:

"A reviewing court is bound by trial court's findings of fact founded on any rational basis of evidence."

Coleman v. *U. S.* (C.A., D.C.), 176 F. 2d 469:

"Trial judge has primary duty to find facts—and his determination is not to be lightly set aside."

Hidspeth v. *Esso Standard Oil Co.* (C.A. 8), 170 F. 2d 418:

"Court of review * * * does not retry cases or substitute its judgment for that of trial court on fact issues."

Fox River Paper Corp. v. *U. S.* (C.A. 7), 165 F. 2d 639:

> "Court of Appeals will consider only the evidence that supports finding, and it will not weigh the evidence or resolve any conflicts therein, or consider credibility of witnesses."

But it is useless to state these rules in generalities unless the Appellate Court follows them in application to the factual situation. This the Court of Appeals did not do in this case. It did not take that view of the evidence most favorable to the prevailing party. It did weigh the evidence, and did pass on the credibility of the witnesses. It did determine what it would have decided had it been the trier of the facts. And it did resolve a conflict of medical opinion in a way contrary to the trial court.

This is contrary to what the Court of Appeals refused to do *against* the Government in a similar case in *Colusa Remedy Co.* v. *U. S.* (C.A. 8), 176 F. 2d 554, wherein it appeared that the question of effectiveness of a remedy had not transcended the realm of opinion into the realm of demonstrable fact, and the court quoted from *American School of Magnetic Healing* v. *McAnnulty*, 187 U.S. 94, 23 S. Ct. 33, 47 L. ed. 90, in which this Court said:

> "It is a *question of opinion*, in all the cases, and although *we* may think the opinion may be *better* founded and based upon a more intelligent and a longer experience in some cases than in others, yet after all, it is, in each case, opinion only, and not existing facts with which these cases deal."

The opinion in this case is in conflict with that in *United States* v. *Dr. David Roberts Vet. Co.* (C.A. 7), 104 F. 2d 785, in which it is said:

> "The point is made that a man should not be convicted *because he has not received the endorsement of the medical profession* and *United States* v. *American Laboratories*, 222 F. 104, is cited. * * * As defendant's testimony made for conflicting evidence, a question of weighing the evidence was presented. To weigh the evidence is not within the power of this court."

and is in conflict with *United States* v. *Kaadt* (C.A. 7), 171 F. 2d 600:

> "We have already held that a *consensus of medical opinion* is a question of fact and proveable as such, * * * and it has been held that a *conflict of medical opinion concerning the effectiveness of a drug* also presents a question of fact. *7 Cases* v. *U. S.*, 239 U.S. 510, 36 S. Ct. 190, 60 L. ed. 411, L.R.A. 1916 D. 164."

and is also in conflict with *United States* v. *Six Dozen-Dr. Peter's Juriko* (C.A. 7), 158 F. 2d 667, wherein a great deal of medical testimony was offered by both sides, as to which it was said that,

> "* * * no useful purpose could be served in an attempt to analyze or dissect this expert testimony as it pertains to the issues in controversy. In fact, to do so would involve a *weighing* of the testimony, which is not our function but was that of the jury."

But it may be said that even though this is an important case to these petitioners and to the patients who have been receiving his medicines in interstate commerce,

yet it is only one mistake by one court in one case and is not sufficiently important for this Court to take jurisdiction to correct that mistake. And yet the application of Rule 52(a) as was done by the Court of Appeals in this case involves a much more important matter, and that is:

When do Findings of Fact by a trial court become so "clearly erroneous" that the opportunity of the trial court to judge of the credibility of the witnesses may be disregarded? If the meaning of Rule 52 (a) is not "clear," as it apparently is not, it should be made clear by this Court.

The best summation which we have been able to find as to the true meaning of the rule in its application to factual situations is that in *Orvis* v. *Higgins* (C.A. 2), 180 F. 2d 537. The court reviews the *Gypsum case, supra*, and points out that the *oral* testimony in that case was in conflict with the *documentary* proof, and reconciles the *Gypsum case* with the *Yellow Cab Co. case, supra*, because in the latter case the oral testimony was not incompatible with inferences which could be reasonably drawn from the documentary evidence, and in the light of these cases makes the following gradations under Rule 52(a):

> "Where the trial judge sits without a jury, the rule varies with the character of the evidence: (a) If he decides a fact issue on *written* evidence *alone*, we are as able as he to determine *credibility*, and so we may disregard his findings. (b) Where the evi-

dence is *partly oral* and the balance is *written* or deals with *undisputed* facts, then we may ignore the trial judge's finding and substitute our own. (1) if the written evidence or some undisputed fact renders the credibility of the oral evidence extremely doubtful, or (2) if the trial judge's finding must rest exclusively on the written evidence or the undisputed facts, so that, *evaluation of credibility has no significance.* (c) But where the evidence supporting his findings as to any fact issue is *entirely oral* testimony, we may disturb that finding *only in the most unusual circumstances.*"

Even this gradation, however, leaves much to be desired. For, we may ask, what are "most unusual circumstances?" which would make such findings "clearly erroneous?"

Bouvier, citing Webster, defines "clear" as being "Free from indistinctness or uncertainty; easily understood; perspicuous, plain; free from impediment, embarrassment or accusation." And "clearly" according to Webster's definition of it, means "in a clear manner; without obscurity; without obstruction; without entanglement or confusion; without uncertainty."

Judge Chase, in a dissenting opinion in *Orvis* v. *Higgins, supra,* remarked that "Though trial judges may at times be mistaken as to facts, appellate judges are not always omniscient." In this connection it might be pointed out that this case was argued before the Court of Appeals on November 26, 1951 (R. 1157) and after practically every other case submitted at that term had long since been decided, and while the court was in sum-

mer vacation, the opinion in this case was rendered on July 31, 1952 (R. 1157), and a report thereof was published in the *Dallas Morning News* at a time when petitioners were engaged in the trial of a libel suit against Morris Fishbein, former Editor of the Journal of the American Medical Association, on account of publications written by him and published in that Journal in which petitioner Hoxsey was referred to as a "Cancer charlatan" and other similar charges were made as to the effectiveness of petitioners' remedy, in which trial many of the same witnesses, including some of the Government *expert* witnesses, testified, and in which the issues were very substantially the same, *i.e.*, the efficacy of Hoxsey's treatment, and at the conclusion of that trial in the District Court of the 44th Judicial District of Dallas County, Texas (Case No. 31011-B), *a jury of twelve men unanimously* branded all the charges so made against Hoxsey as *false*, in effect following Judge Atwell's findings in this case.

There must be some tribunal in which fact-finding power is lodged. Our conception of where that should be is, in the jury where there is a jury, and in the trial judge where he sits without a jury. This we think to be the meaning of Rule 52(a). Most of the courts follow that rule. But as long as there remains any obscurity in the true meaning of this expression "clearly erroneous" some Courts of Appeals will in isolated instances continue to take it upon themselves to pass upon

the weight of the evidence and the credibility of the witnesses as the Court of Appeals has "clearly" done in this instance. And we use the word "clearly" here advisedly, because there is no obscurity but that the Court of Appeals has done that very thing here; no uncertainty about it—because it uses the word "weight" when referring to the evidence and the word "credible" when referring to the witnesses, many times in the opinion.

B.

One of the purposes stated by the framers of the Constitution of the United States was to "promote the general Welfare" (Preamble, Constitution), and Congress was given the power to provide for the general welfare, and to regulate commerce among the several States (Constitution, Art. 1, Sec. 8); but by the 5th Amendment it was provided that no person should be deprived of life, liberty, or property, without due process of law, and by the 10th Amendment all powers not delegated to the United States by the Constitution, nor prohibited by it to the States, were reserved to the States respectively, *or to the people*.

Let it be understood that we are not attacking the constitutionality of the Federal Food, Drug and Cosmetic Act, the ultimate goal of which was declared in *McDermott* v. *Wisconsin*, 228 U.S. 115, 33 S. Ct. 431, 57 L. ed. 754, to be consumer protection.

But the application of that Act to petitioners in the manner here proposed does deny to many persons their inalienable right to investigate and choose a doctor duly qualified and licensed as such, according to their own individual belief, and to take the medicines prescribed by that doctor in an effort to cure or alleviate whatever disease they believe they are afflicted with; and it does deny to petitioners' doctors, duly qualified and licensed by the State as such, of their right to prescribe what medicines they believe proper for the relief or cure of their patients.

CONCLUSION

It is respectfully submitted that this Honorable Court should exercise its discretion and under its supervisory powers assume jurisdiction of this case, to the end that the true meaning of the power of Courts of Appeals under Rule 52(a) may be properly and authoritatively defined, and upon hearing that the judgment of the Court of Appeals for the Fifth Circuit shall be reversed; and that to such an end that a writ of certiorari should be granted and this Court should review the decision of said Court of Appeals and finally reverse it.

Respectfully submitted,

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DECEMBER, 1952.

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 491

HOXSEY CANCER CLINIC, a partnership, and HARRY M. HOXSEY, an individual, *Petitioners*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 1140-1147) is reported at 94 F. Supp. 464. The opinion of the Court of Appeals (R. 1157-1173) is reported at 198 F. 2d 273.

JURISDICTION

The judgment of the Court of Appeals was entered July 31, 1952 (R. 1173). A petition for rehearing was denied September 10, 1952 (R. 1194). The petition for a writ of certiorari was filed on December 8, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether the Court of Appeals was precluded by Rule 52 (a), F.R.C.P., from reversing where on the entire evidence it was "left with a definite and firm conviction that a mistake [had] been committed" by the District Court in its finding that Mr. Hoxsey's medicines, taken orally, sometimes cure cancer.

STATUTE INVOLVED

The Federal Food, Drug, and Cosmetic Act, 52 Stat. 1040, 21 U.S.C. 301 *et seq.*, provides in pertinent part:

> Section 301 [21 U.S.C. 331]: The following acts and the causing thereof are hereby prohibited:
>
> (a) The introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded.

Section 502(a) [21 U.S.C. 352(a)] describes a drug as misbranded if its labeling is false or misleading in any particular. Section 302 [21 U.S.C. 332] vests the United States District Courts with jurisdiction, for cause shown, to restrain violations of Section 301(a).

STATEMENT

This litigation concerns the activities of the Hoxsey Cancer Clinic and Mr. Harry M. Hoxsey[1] who operate in Dallas, Texas. The petitioners hold themselves out as having a successful treatment for all types of cancer (Govt. Ex. 2, pp. 2, 5, 7). They claim (Govt. Ex. 14, p. 1) that the Hoxsey drugs were originated by Mr. Hoxsey's grandfather about 1840 in Kentucky, were later used by the defendant's father, and after his death in 1919 the treatment was carried on by Mr. Hoxsey in conjunction with doctors. Since 1946, Hoxsey has operated through J. B. Durkee, a licensed osteopath, who has the title of Medical Director (R. 902-903).

The United States sued under the Federal Food, Drug, and Cosmetic Act to enjoin the defendants from introducing the Hoxsey medicines into interstate commerce, alleging that the drugs were falsely represented by labeling to be effective cures for cancer in man (R. 3-6, 539).

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[1] Harry M. Hoxsey is a layman, not a medical man. He did not testify at the trial.

The Medicines. The drugs involved are two liquid medicines.[2] One, a brownish-black mixture, contains in varying dilutions potassium iodide and extracts from cascara sagrada, common buckthorn, alfalfa, red clover blossom, northern prickly ash, and syrup of honey drip cane (R. 37-38, 40, 554-557, 569, 914, 977-979, 985-987, Govt. Ex. 11-12).[3] The other, a pink liquid, contains potassium iodide and lactate of pepsin (R. 567).[4]

The Labeling. The alleged false representations were made in two booklets, Govt. Ex. 2 and 14. The complaint charged that the drugs were misbranded because (1) the labeling, by general and specific statements, falsely represented that the medicines can and do cure cancer,[5] and (2) the

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[2] In addition to the liquid medicines for internal cancers, petitioners have an escharotic powder consisting of a corrosive or caustic substance, the basic ingredient of which is arsenic (R. 998-999). The escharotic is applied directly to external cancers and burns off the affected tissue as well as any surrounding normal tissue that it contacts (R. 1117). That drug and external cancers are *not* involved in this case.

[3] Prickly ash and the laxatives, cascara sagrada and buckthorn, are sometimes omitted from the formula (R. 979, 1021-1022, 1025-1026).

[4] When the drugs are shipped direct to patients they are in dilute form. When shipped to practitioners they are in concentrate form in 16 ounce containers bearing directions that they be diluted with enough distilled water or elixir of lactate of pepsin, as the case may be, to make a gallon (R. 4, 38-39). Typical analyses appear at R. 71, 72, 73, 74, 75, 76, 79.

[5] See particularly the speech made by Dr. Durkee on October 17, 1947, reprinted in the booklets (Govt. Ex. 2, pp.

labeling falsely represented that the Hoxsey drugs had cured a number of persons whose testimonials and names appear in the booklets (R. 4-5). The labeling was before both courts below and is here for consideration as to the actual representations made.

The Government's Proof of False Claims. The allegation that the drugs have not cured, and cannot cure, cancer was proved in five ways. First, through experts in pharmacology and experimental therapeutics who were familiar with the pharmacology of the several ingredients in the medicines (R. 86-93, 102-108), it was proved that the ingredients alone and in combination have no effect in eliminating or retarding the growth of cancerous cells (R. 93). Indeed, it was shown that red clover blossom, northern prickly ash, and alfalfa are therapeutically inactive (R. 92-93), that the sugars in the mixtures would be active only for their food value (R. 92), that cascara sagrada and buckthorn act as laxatives (R. 91), and that potassium iodide increases, rather than retards, the growth rate of cancerous cells (R. 108).

Second, the Government produced the results of controlled animal experiments conducted at the

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2-6; Govt. Ex. 14, pp. 4-8). This was about one year and a half after he became associated with the Hoxsey Cancer Clinic on a part-time basis (R. 902, 905). It purports to explain the Hoxsey treatment as "a revolutionary treatment" for cancer which produces better results than the orthodox methods, surgery and radiation.

Roscoe B. Jackson Memorial Laboratories, Bar Harbor, Maine, an institution engaged in fundamental research in the biology of cancer (R. 122-124), which established that the Hoxsey drugs had no beneficial effects on cancers in the afflicted animals (R. 126-132, 146). In the experiments, new tumors were observed on a number of animals and the malignant growths were larger at the end of each experiment than when it was begun (R. 131).

Third, the Government presented the testimony of an outstanding practitioner (R. 156-157) to explain the recognized and accepted methods of diagnosing and treating cancer (R. 156-157). Through this witness, it was proved that cancer can be diagnosed accurately only by a qualified pathologist who makes a biopsy examination of the suspect tissue (R. 158-159). It was proved also that the only ways of treating internal cancer known to medical science are surgery and radiation (R. 159), not by any medicine taken orally (R. 160).

Fourth, the Government presented 16 case histories wherein the Hoxsey medicines did not cure cancer. Nine of these people were named in the booklets as having been cured of cancer. A summary of these cases follows:

Mrs. Murray W. Baker, Gov. Ex. 14, p. 10. The booklet represents that she was successfully

treated by the Hoxsey drugs for cancer of the breast.

The facts are: In November 1945 Mrs. Baker was examined by a qualified physician and surgeon (R. 236, 248). It was ascertained after biopsy[6] that she had cancer of the breast (R. 256). The doctor recommended removal of the breast and X-ray. The patient did not follow this advice (R. 237, 249), but went to the Hoxsey Cancer Clinic and took the Hoxsey cancer medicines (R. 239). In April, 1950 Mrs. Baker went back to her doctor (R. 240, 250), and it was found that she had several new tumors in the breast and nodules in the axilla (or armpit) (R. 250). The breast, muscles and glands from the right chest together with all fat and gland structure in the armpit were removed (R. 250). Pathological examination of the tissue removed showed cancer of the breast with spreading to axilla and glands, the cancer being of the same type as in 1945 (R. 256-257).

A. O. Vinson, Gov. Ex. 2, p. 22. The pamphlet lists this patient as "Vincent" (R. 450). It includes a transcript of testimony alleged to have been given by this patient on February 2, 1947

[6] A biopsy is a diagnostic examination of a piece of tissue removed from a living subject. See The American Illustrated Medical Dictionary. It involves miscroscopic examination of the tissue by a trained pathologist and is the only certain means of diagnosing cancer (R. 158).

which suggests that the Hoxsey treatment resulted in his complete recovery from various cancers of the body.

The facts are: In November 1946 Dr. V. D. Goodall removed a tumor from the front of the patient's right ear; pathological examination showed it to be malignant melanoma (R. 449, 454). In February 1947 Mr. Vinson was under treatment at the Hoxsey Clinic (Gov. Ex. 2, pp. 13, 22) and stated that he felt that he was on the road to complete recovery. In April of 1947 Dr. Francis Leon Ware took a piece of bone tissue from the patient's right tibia (the large bone of the leg, below the knee) (R. 455-456) which was examined pathologically. The findings were malignant melanoma and metastasis to the bone. The cancer, which originated in the skin, had been carried and set up a new tumor (R. 456-457). He was under Dr. Durkee's care for at least 3 years. In February, 1950 Dr. Durkee sent him to Dr. Keith Lowell, an osteopathic physician, who diagnosed the condition as melanoma of right ankle and leg and amputated the leg just above the knee (R. 459-460, 929). Pathological examination showed the condition to be malignant melanoma which had originated in another part of the body and had spread (R. 463-464).[7]

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[7] An official document shows that Vinson died after the trial, on Feb. 20, 1951, of a malignancy of 4 years duration. Texas Department of Health Bureau of Vital Statistics, Certificate of Death State File No. 8372.

Mrs. Emma Doyle, Gov. Ex. 14, p. 10. The booklet represents that this patient was successfully treated by the Hoxsey treatment for cancer of the uterus. The facts are: In February, 1943 Mrs. Doyle was suffering from vaginal trouble which Dr. W. P. Lowery, her physician, diagnosed after biopsy as cancer of the uterus (R. 290, 297, 302). She was advised to have the uterus removed but she did not have it done at that time (R. 298). In March, 1943 she went to the Hoxsey Cancer Clinic and took the Hoxsey medicine for several years, until about 1945 or 1946 (R. 291, 293). In December, 1946 she again went to Dr. Lowery with the same uterine complaint and after examination Dr. Lowery removed the entire uterus (R. 298). There was more bleeding at that time than in 1943 and the size of the uterus with the mass had increased (R. 298-299). Pathological examination in 1947 showed advanced cancer of the uterus whereas in 1943 the condition was early cancer (R. 302-303).

Horace F. Irwin, Gov. Ex. 2, pp. 32-34. The booklet contains a transcript of testimony which was given on February 2, 1947. This suggests that the patient had cancer of the throat, that after three weeks of the Hoxsey treatment there had been considerable improvement and that the patient was on the road to recovery. The facts are: In May, 1946 this patient was examined at the Mayo Clinic in Rochester, Minnesota and Dr.

Foss, a specialist in laryngology, after biopsy, diagnosed the condition as cancer of the larynx (R. 401, 410-411, 420). Surgery was recommended but Irwin declined (R. 401, 411). In January 1947, Irwin went to the Hoxsey Clinic and Dr. Durkee diagnosed the condition as cancer of the lungs. Irwin took the black Hoxsey medicine for 6 months (R. 402). On August 11, 1948 Dr. Gammell, an ear, nose and throat specialist examined Irwin in the emergency room of the Rhode Island Hospital in Providence and was afraid the patient would die before reaching the operating room. He did stop breathing. An emergency life-saving tracheostomy was performed, a tube placed in his windpipe and the doctor was able to get him breathing again (R. 422-423). Ten days later Dr. Gammell removed the larynx (R. 424). The tumorous mass which had taken 2½ years to grow (R. 426) was sent to the hospital laboratory and was found to be cancerous (R. 428).

Mrs. Nola E. Stroud, Gov. Ex. 2, p. 8; Gov. Ex. 14, p. 12. The booklet represents this woman as having been successfully treated by the Hoxsey method of cancer of the uterus. The facts are: Mrs. Stroud was treated for cancer of the uterus in 1943 by Dr. Glen Johnson (R. 358, 361). She was given radium and X-ray therapy treatments (R. 359, 361). In January of 1944 there was no in-

dication of malignancy (R. 360). In August, 1944 Mrs. Stroud was examined at the Hoxsey Clinic by a Dr. J. P. Johnson and she took the Hoxsey treatment for more than 18 months (R. 366). While she was taking the Hoxsey drugs, Dr. J. P. Johnson of the Hoxsey Clinic thought her condition was getting worse and he told her husband that the clinic could not do anything for her. He recommended that she be taken home and have surgery performed for removal of the uterus (R. 394). Thereupon Mrs. Stroud went to see Dr. Burton (R. 380). On July 5, 1946 he operated and removed the uterus (R. 381-383) which on pathological examination was found to be cancerous (R. 388).

Jack T. Davis, Gov. Ex. 14, p. 10. The booklet represents that this patient was successfully treated by the Hoxsey drugs for cancer of the tongue. This patient, a boy of 8 years in 1948, did not have cancer when he went to the Hoxsey Cancer Clinic. Dr. C. M. Harwell removed a wart-like growth from the end of the boy's tongue in May, 1948 (R. 223). The excised growth was surrounded by normal tissue (R. 227). A sprig of malignancy was found in the excised tissue by one pathologist (R. 225) although a second pathologist, on careful dissection and microscopic examination, found it to be a benign tumor of a type that might readily be confused with cancer

(R. 232). In any event, there was no doubt that the abnormal growth was totally removed (R. 233). The tongue healed very nicely after the sutures were removed (R. 224) and only a scar remained with no swelling (R. 220). Later that month the boy was taken to the Hoxsey Clinic for treatment (R. 974). Dr. Durkee stated that the boy had cancer of the tongue when he came there (R. 938). On cross-examination Dr. Durkee stated that the tumor was still there and that there was no evidence of an incision having been made or stitches taken (R. 975). Dr. Durkee made no biopsy and based his diagnosis on the history given by the boy's father and by looking at and feeling the tongue (R. 975).

Mrs. C. A. Gatlin, Gov. Exs. 2, p. 9; 14, p. 10. The booklet suggests that this patient was successfully treated by the Hoxsey drugs for cancer of the bowel. The facts are: In June, 1936 the patient went to Dr. R. D. Gist complaining of stomach trouble. He recommended an operation to see what should be done to relieve her, but she did not have this operation. She went to the Hoxsey Clinic in November, 1936, suffering from pain in the stomach, and she stated that her condition was there diagnosed as cancer but there was no biopsy (R. 340-342). She took the Hoxsey medicines and was told in the spring of 1937 that she was cured (R. 342). In December of 1937 she was again

suffering from pain in her stomach and she again went to Dr. Gist (R. 343, 349). Dr. Gist operated and found peritonitis from a ruptured duodenal ulcer of long standing but with no evidence of malignancy (R. 350-351).

Miss Dorothy Bradberry, Gov. Ex. 14, p. 10. The booklet represents that this patient was successfully treated by Hoxsey for cancer of the breast. The facts are: In June, 1945 Miss Bradberry was treated by Dr. A. R. Thomasson (R. 520, 531), and a small tumor was removed from her right breast (R. 532). Pathological examination showed that it was not malignant (R. 533, Gov. Ex. 16). In February, 1947 she went to Dr. Ray Thomasson, son of Dr. A. R. Thomasson, and he diagnosed her complaint as mastitis of the right breast, a condition that is not malignant. She was treated with penicillin and sulfadiazine and was given X-ray treatments to alleviate the pain (R. 532, 533, 537). In March, 1947 she went to the Hoxsey Cancer Clinic and was treated for cancer without a biopsy being taken (R. 522-523).

Mrs. A. L. Ebel, Gov. Ex. 2, p. 9; Gov. Ex. 14, p. 10. The booklets represent that Mrs. Ebel was successfully treated for cancer of the bladder by the Hoxsey medicines. Dr. J. C. Alexander, a specialist in urology diagnosed Mrs. Ebel's condition as cancer of the bladder. This diagnosis was corroborated by pathological examination (R.

185). On March 18, 1942 following this diagnosis, he operated and removed the entire cancer and a half inch beyond its margins (R. 185) and applied radium (R. 186). Mrs. Ebel went to the Hoxsey Clinic about July, 1943 where she was examined by Dr. Johnson who did not use a cystoscope (R. 191). She took the Hoxsey medicine for 5 days (R. 200). Dr. C. M. Crigler, a specialist in urology, examined Mrs. Ebel a number of times using a cystoscope (R. 203). His first examination was December 31, 1942 (before she went to the Hoxsey Clinic). He observed a perfectly healed scar from the operation in March and no recurrence of any tumor in the bladder (R. 203). Dr. Crigler made other examinations on March 2, 1943, June 24, 1943, July 1, 1943 and July 7, 1947 (R. 204-205). In the examination of July 1, 1943 and July 7, 1947 the neck of the bladder or urethra was getting tight and causing a stricture of the bladder neck (R. 205). There was no evidence in any of the examinations of any recurrence of the malignant bladder condition (R. 204-205).

To summarize, the Government proved that nine persons, represented in the labeling as having been cured of cancer by the Hoxsey drugs, either did not have cancer at all (Davis, Gatlin, Bradberry, Ebel) or that their cancerous condition continued to develop while they were taking the drugs (Baker, Vinson, Doyle, Irwin, Strond).

In addition, the Government presented carefully documented case histories on seven other patients showing that all seven actually had cancer and that they were treated unsuccessfully with the Hoxsey drugs. Four of the patients died of cancer despite the treatment. They were Mrs. Pearl Harris (R. 169-171, 176, 177, 181); Mr. Dan Hedrick (R. 278, 280-282, 287, 289, Govt. Ex. 15); Carroll Grady (R. 430-432, 435, 437-438); and Mary Louise Hafertepe (R. 474, 467, 477, 479, 484). The other three patients showed no improvement. Mr. Pope (R. 259, 262, 273-276) was operated on for cancer after taking the treatment. Mrs. Brumsey (R. 486, 489, 494, 506-507, 511) was operated on for cancer while taking the Hoxsey drugs. Mr. Campbell (R. 306, 308-309, 313, 322-323, 331, 334-335) regressed under the Hoxsey drugs but improved with subsequent X-ray treatment.

Finally, the Government proved that Hoxsey himself submitted to the National Cancer Institute the names of 77 persons allegedly cured of cancer (R. 1135), but that the National Cancer Council rejected the proposal that the National Cancer Institute make a scientific evaluation of the drugs because none of the 77 cases submitted met the basic scientific requirements necessary to indicate that the drug had a beneficial effect on cancer (R. 1136-1139).

The Defense. Petitioners resisted the Government's case primarily through testimony from

laymen that they had been cured of cancer by the Hoxsey medicines (R. 577-778, 807-828, 836-902).[8] This was supplemented by the testimony of Dr. Durkee (R. 903-1083). In addition, Dr. L. E. Downs, an osteopathic physician called by the Government to prove interstate shipments of the medicines to him (R. 35-44), was questioned on cross-examination about the effectiveness of the drugs and gave some testimony favorable to petitioners (R. 45-52). Dr. E. S. Macauley, another osteopathic physician subpoenaed by the Government to prove interstate shipments but not called as a Government witness (R. 545, 549, 552), also testified for petitioners (R. 544-551).

The District Court denied the Government's prayer for injunctive relief, finding that the medicines sometimes cure cancer, that the booklets promised nothing more, and that the Government had failed to carry its burden of proof (R. 1140-1147).

The Court of Appeals reversed and remanded with instructions to grant the injunction as prayed. The court, after reading the booklets, concluded that they represent to the public that the Hoxsey drugs have cured the nine persons listed as patients[9] and that the booklets promise

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[8] The evidence was strongly relied on by petitioners in the Court of Appeals, but their petition for certiorari fails to mention it at all in discussing the evidence. See pp. 10-11, 17-18.

[9] See pp. 6-14, *supra*.

persons suffering from cancer results at least comparable to surgery and X-ray (R. 1159, 1163-1164). Finding the evidence uncontradicted as to the falsity of the nine specific claims of cures, the court held that the Government was entitled to judgment to that extent. The court went further, holding that the testimony of laymen about cancer cures was entitled to no weight, and that the district judge's findings, supported only by the testimony of three osteopaths, two of whom did not claim to be experts in cancer and the other an interested witness, and contradicted by the other scientific evidence, were clearly erroneous. The Court of Appeals expressly recognized and applied the rule stated in *United States* v. *Gypsum* Co., 333 U.S. 364, 395 (R. 1171-1172).

ARGUMENT

1. This case involves only factual issues. The Court of Appeals, after a careful review of the entire 1156 page record (R. 1165-1171), was left with a definite and firm conviction that a serious mistake had been committed in the trial court's findings of fact. It reversed because there was clear error in the basic finding that the medicines involved are effective cancer cures. This it was authorized to do by the plain language of Rule 52(a), F.R.C.P.[10] *United States* v. *Gypsum Co.*,

[10] Under Rule 52(a), the trial court's findings of fact may be set aside when "clearly erroneous."

333 U.S. 364, 394-395; *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 342; *United States* v. *Oregon Medical Society*, 343 U.S. 326, 339.

Petitioners argue that the Court of Appeals entirely disregarded the trial court's findings, simply weighed the testimony, and passed on the credibility of the witnesses (Pet. 15). A mere reading of the opinion below (R 1157-1173) shows that the court correctly understood and applied Rule 52(a). The scientific evidence for the Government was reviewed and found overwhelmingly to support the complaint. The petitioners' defense also was examined. On the entire record, the testimony of the witnesses Downs and McCauley was considered insubstantial because the doctors were not experts in cancer. They were general practitioners without special qualifications (R. 35, 44-45, 48-54, 547-548, 569). Indeed, the trial judge curtailed cross-examination of McCauley because "He doesn't offer himself here as an expert." (R. 562). And Dr. Durkee's testimony was deemed insubstantial because of his financial interest (R. 1003) and his assertion that he could diagnose cancer without a biopsy (R. 1051), contrary to all accepted scientific knowledge reflected in the record.

The Court of Appeals properly analyzed and evaluated petitioners' testimony as follows (R. 1171):

> * * * when the subject of investigation is the existence of cancer, the personal testimony of the lay sufferer is entitled to no weight, since the overwhelming preponderance of qualified opinion recognizes that not even the experts can assuredly diagnose this condition without the aid of biopsy and pathological examination. Hearsay testimony of what such a person has been told by a physician is entitled to no greater weight. Except for such testimony and the testimony of the three osteopaths, two of whom did not claim to be experts on the diagnosis and treatment of cancer, and the third of whom is a definitely interested witness who testified as to ability to diagnose contrary to all accepted scientific knowledge, the testimony on behalf of the Government in the full and complete establishment of its case of misbranding is not substantially disputed.

Petitioners seek to leave the impression that this case involves different schools of medical thought (Pet. 19-20). The record contains no evidence whatever to support the claim that this is a contest between two schools—osteopaths versus medical doctors (Pet. 20). On the contrary, it is shown that two of the three osteopaths involved have qualified to practice by examinations in the same basic sciences that are studied

by medical doctors (R. 545, 904).[11] And there is no suggestion in the record that there is anything in the science of osteopathy that would support a claim of effectiveness for the Hoxsey drugs.

Moreover, the cases cited by petitioners (Pet. 24-25) do not hold that courts are without power to determine medical facts, as well as facts in other fields. This Court, in *Reilly* v. *Pinkus,* 338 U.S. 269, 274, recently held it erroneous, even in a postal fraud proceeding, to reject informed medical judgments of Government witnesses simply because witnesses were produced by the respondent who blindly adhered to a technique discredited by reliable scientific experiences. And as the Court of Appeals pointed out (R. 1172):

> We do not have for consideration the merits even of any claimed newly discovered, or secret, drug or cure. The case involves the efficacy of only well known drugs. As a cure for cancer these have been weighed and found wanting.

It is, of course, true that findings of a trial judge may be disturbed on appeal only in unusual circumstances. But it is submitted that such circumstances exist when a trial court has found, on the basis of testimony by laymen and interested

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[11] Dr. Downs did not take the basic sciences examination because he was practicing before the examination became a state requirement (R. 44-45).

or uninformed practitioners, that a group of herbs and potassium iodide in a liquid medicine will cure cancer. The well established medical facts show that the finding is clearly erroneous.

2. Petitioners are asking this court to review the review which the Court of Appeals has already given to the record in the District Court. They seek to minimize the Government's case and to show that Dr. Durkee was better qualified as an expert in cancer than all of the Government witnesses (Pet. 16-19). But this Court does not make an "independent review of the review" below. *National Labor Relations Board* v. *Pittsburgh S. S. Co.*, 340 U. S. 498, 502-503. As in that case, the Court of Appeals made a painstaking review of the findings and found them unsupported by substantial evidence. The decision in the Court of Appeals turned solely on an evaluation of the entire record, and no legal issues for certiorari are involved.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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